

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-10910-16  
AGENCY DOCKET NO.: OTSC #E16-39

MARLENE CARIDE,<sup>1</sup> )  
ACTING COMMISSIONER, )  
NEW JERSEY DEPARTMENT )  
OF BANKING AND )  
INSURANCE, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
WILLIAM M. KWASNIK )  
 )  
Respondent. )

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31 N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the February 5, 2018 Initial Decision (“Initial Decision”) of Administrative Law Judge Jeff S. Masin (“ALJ”), which granted a Motion for Summary Decision brought by the Department of Banking and Insurance (“Department”) on all three Counts alleged in the Department’s Order to Show Cause No. E16-39 (“OTSC”), and recommended revocation of the Respondent William M. Kwasnik’s (“Respondent” or “Kwasnik”)

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<sup>1</sup> Pursuant to R. 4:34-4, Acting Commissioner Marlene Caride has been substituted in place of former Commissioner Richard J. Badolato in the caption.

insurance producer license and the imposition of civil monetary penalties in the amount of \$25,000.

### STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 17, 2016, the Department issued the OTSC against the Respondent, which sought revocation of the Respondent's producer license, reimbursement of the costs of investigation and prosecution,<sup>2</sup> and imposition of civil monetary penalties for alleged violations of the Producer Act and the regulations governing the conduct of insurance producers in this State. The OTSC contains three Counts as follows:

Count One – Kwasnik engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and used fraudulent, coercive, or dishonest practices and committed a fraudulent act, in violation of N.J.S.A. 17:22A-40a(2), (7), (8), and (16); and

Count Two – Kwasnik did not report to the Commissioner that on September 4, 2015, he entered into a Consent Order with the Chief of the New Jersey Bureau of Securities, another governmental agency in this State, within 30 days of the final disposition of the matter in violation of N.J.S.A. 17:22A-47a; and

Count Three – On the January 9, 2015 renewal application, Kwasnik failed to disclose that he was involved in an administrative proceeding with the New Jersey Bureau of Securities, brought in 2011, Docket Number ESX-C-59-11; in violation of N.J.S.A. 17:22A-40a(1) and (15).

On or about June 27, 2016, the Respondent acting pro se, filed an Answer to the OTSC, wherein he admitted to and denied some of the allegations, set forth affirmative defenses, and requested a hearing. The Department transmitted the matter as a contested case to the Office of

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<sup>2</sup> Although the Department requested that these costs be reimbursed, no certification of the costs of investigation and prosecution was filed.

Administrative Law ("OAL") on July 21, 2016, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

On or about December 23, 2016, the Department moved for Summary Decision against the Respondent. The Respondent did not file any opposition to the Department's motion for Summary Decision. However, by letter dated March 2, 2017, the Respondent requested a "stay" because he had been indicted in the United States District Court of New Jersey.<sup>3</sup> Exhibits A and B to Deputy Attorney General Jeffrey S. Posta's letter to ALJ Laura Sanders, dated May 8, 2017. The Department, through counsel, Deputy Attorney General Jeffrey S. Posta ("DAG Posta") opposed the stay. By letter dated June 28, 2017, Laura Sanders, Acting Director and Chief Administrative Law Judge, denied Respondent's request for a stay.

On July 26, 2017, ALJ Sanders's legal assistant, Claire Applewhite, e-mailed Respondent advising that he could file a response to the Motion for Summary Decision by August 30, 2017. The Respondent did not respond to the e-mail or file any opposition to the Department's motion for Summary Decision.

On February 5, 2018, the ALJ granted summary decision to the Department on all Counts of the OTSC and recommended revocation of Respondent's producer license and the imposition of civil monetary penalties against Respondent in the amount of \$25,000.

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<sup>3</sup> Respondent and his son, Michael Kwasnik, were indicted on three counts of wire fraud, two counts of mail fraud, one count of conspiracy to commit money laundering, and seven counts of money laundering. Michael Kwasnik was indicted on eight additional counts of transacting in criminal proceeds. The actions in this indictment relate to allegedly defrauding clients of Michael Kwasnik's law firms by enticing them set up trusts and to name Michael Kwasnik as the trustee. Trust assets were then deposited into a bank account to which Michael Kwasnik had access. The funds were then transferred to other accounts and used by Respondent and Michael Kwasnik for legal and personal expenses.

### ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ applied the standard for summary decision pursuant to N.J.A.C. 1:1-12.5 and Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). The ALJ noted that a Summary Decision may be rendered if the filed papers, discovery, affidavits, and reasonable inferences arising from the evidence being accorded to the opponent of the motion show no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Initial Decision at 4.

The ALJ found that the following facts in the record: i) Respondent was charged with securities law violation in 2011 lawsuit brought by the New Jersey Bureau of Securities ("Bureau"); ii) a Consent Order and Final Judgment ("Consent Order") was entered into by the Respondent in the Bureau proceeding, in which he admitted participation in the fraudulent and deceitful scheme that involved the sale of unregistered securities; iii) Respondent did not inform the Commissioner of the entry of the Consent Order; and iv) Respondent failed to disclose that he was involved in the proceeding with the Bureau when he filed his Renewal Application. The ALJ found that all of these facts as charged in the OTSC were all unopposed. Id. at 4-5. Accordingly, the ALJ concluded that there was no genuine issue of material fact and found that Summary Decision was appropriate. Id. at 5.

The ALJ found that Respondent violated N.J.S.A. 17:22A-40a(1), (2), (7), (8), (15), (16) and N.J.S.A. 17:22A-47a, and concluded that the Respondent was subject to sanctions as authorized by N.J.S.A. 17:22A-40a. Id. at 6. The ALJ determined that the imposition of civil monetary penalties and the revocation of the Respondent's insurance producer license was appropriate in this matter. Id. at 8. The ALJ noted that revocation has consistently been imposed upon producers who engage in fraudulent conduct. Citing, Commissioner v. Hohn, OAL Dkt. No.

BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Id. at 6. Further, the ALJ found that the Respondent did not offer any mitigating evidence or argument against revocation. Ibid. Additionally, the ALJ found that the Respondent's failure to notify the Commissioner that he entered into a Consent Order with the Bureau and failure to disclose that he was involved in an administrative proceeding with the Bureau "heightens the picture of a person unwilling or unable to comply with the law governing the profession for which he was licensed." Ibid.

Turning to the appropriate monetary penalty in this matter, the ALJ noted that the factors for determining monetary penalties are set forth in Kimmelman v. Henkle & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 7. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Ibid.

Regarding the first factor, the ALJ noted the Department's argument that the Respondent was a knowing participant in a fraudulent scheme and the Respondent's failure to disclose his involvement with the Bureau proceeding and his admission of misconduct in the Bureau Consent Order demonstrates that he was not acting in good faith. Ibid. The ALJ noted that no evidence was presented regarding the second factor, the Respondent's ability to pay. Ibid. The ALJ also indicated that no evidence was presented regarding the profit the Respondent made from illegal activity, although the Department argued that the Respondent remained licensed while withholding information of his wrongdoing. Ibid. The ALJ found that the public was undoubtedly harmed by the breach of fiduciary duty to those affected by the fraud. Ibid. Regarding duration, the ALJ noted that the Respondent withheld crucial information from the Commissioner for four years,

from the date of the lawsuit brought by the Bureau until the filing of the present initial decision. Ibid. Finally, the ALJ noted that there were neither criminal actions nor prior violations. Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty be imposed against the Respondent in the amount of \$25,000, which should be allocated as follows: \$5,000 for his violations of N.J.S.A. 17:22A-40a(2), (7), (8), and (16), stemming from his participation in a fraudulent scheme (Count One); \$10,000 for his failure to notify the Department of the Consent Order in violation of N.J.S.A. 17:22A-47a (Count Two); and \$10,000 for failure to disclose material information regarding his involvement in an administrative proceeding with the Bureau on his Renewal Applications in violation of N.J.S.A. 17:22A-40a(1) and (15) (Count Three). Ibid. The ALJ treated the violations in Count One as a first violation and the violations in Counts Two and Three as subsequent violations. Id. at 7-8.

#### EXCEPTIONS

Exceptions were due February 20, 2018. Neither the Department nor Respondent filed Exceptions.

#### LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance has been described as “the greater weight of credible evidence in the case is not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975). For all the reasons stated in the Initial Decision and those that follow, I find that the ALJ correctly granted summary decision to the Department on all Counts of

the OTSC. As found by the ALJ, the Respondent failed to produce any evidence that creates a genuine issue of material fact. Accordingly, the Department is entitled to prevail as a matter of law.

Count One —The Respondent participated in a fraudulent scheme.

Count One of the OTSC alleges that Kwasnik engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person and used fraudulent, coercive, or dishonest practices and committed a fraudulent act, in violation of N.J.S.A. 17:22A-40a(2), (7), (8), and (16). I concur with the ALJ that the Department proved the allegations in Count One of the OTSC, and I FIND that Kwasnik's actions, as alleged in Count One of the OTSC, violated N.J.S.A. 17:22A-40a(2) (violating any insurance law or regulation), (7) (committing any insurance unfair trade practice or fraud), (8) (demonstrating untrustworthiness), and (16) (committing any fraudulent act).

The Department submitted undisputed evidence that Respondent participated in a fraudulent scheme with his son, Michael Kwasnik ("M. Kwasnik"), Joseph Schifano ("Schifano"), and Daniel McCorry ("McCorry"). Respondent acted as Chief Executive Officer ("CEO") and was on the Board of Directors of Liberty State Financial Holdings Corp. ("LSFHC."), a holding company of various subsidiaries. Posta Cert. Ex. F; Cert. of DAG Asmar,<sup>4</sup> Ex. 14, M. Kwasnik Dep. 25:12-15, April 21, 2011; Ex. 19, Respondent Dep. 38:20 to 39:23, Dec. 2, 2013. LSFHC was founded by Respondent's son, M. Kwasnik, who also acted as corporate counsel. Ex. 19,

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<sup>4</sup> Several exhibits were attached to the Posta Cert. submitted as part of the Department's motion for Summary Decision, including depositions taken in the action against Respondent by the Bureau. Posta Cert., Exhibit F contains the Certification of Deputy Attorney General Emanuel Asmar ("Asmar"), which was part of the Bureau's action. All depositions transcripts will be referred to by the Exhibit number of Asmar's Certification. Other exhibits will be referred to by the Exhibit Letter of Posta's Certification.

Respondent Dep. 26:10 to 28:6, Dec. 2, 2013; Ex. 12, M. Kwasnik Dep. 48:18-49:7, Oct. 29, 2013; Ex. 14, M. Kwasnik Dep. 13:8-12, April 21, 2011. Respondent was also President of Liberty State Benefits of Pennsylvania, Inc. ("LSBPA"), one of the subsidiaries of LSFHC. Ex. 21, Respondent Dep. 20:5-11, 59:11-16, 60:5-8. March 14, 2011. The Respondent signed documents and corporate checks in his capacity of CEO of LSFHC. Ex. 19, Respondent Dep. 35:7-22, Dec. 2, 2013. He also had the opportunity to review a monthly list of checks issued by LSFHC and raise any issue or concern with the LSFHC Board of Directors about any of the checks. Ex. 20, Respondent Dep. 100:8 to 101:21, Dec. 5, 2013.

Schifano and McCorry previously worked in financial services and advised clients regarding investments. Ex. 16, Schifano Dep. 20:14 to 23:18, Dec. 19, 2013. Schifano was an acquaintance of M. Kwasnik and had referred clients who needed estate planning to him. *Id.* at 25:10-17. Schifano worked at LSBPA while Respondent was President. Ex. 21, Respondent Dep. 154:2-22, March 14, 2011.

From December 2008 to March 2010, M. Kwasnik, McCorry, and Schifano advised investors to invest their money in unregistered securities issued by LSBPA in the form of three-year promissory notes ("LSBPA Notes"). Ex. 12, M. Kwasnik Dep. 122:21 to 123:8, Oct. 29, 2013; Ex. 19, Respondent Dep. 74:1-7, 99:6-12, Dec. 2, 2013. They misled investors into believing that the notes were secured by life insurance policies purchased by LSBPA and that their investments were safe and would earn a 12 percent annual rate of return. Ex. 12, M. Kwasnik Dep. 122:12 to 123:8, Oct. 29, 2013; Ex. 19, W. Kwasnik Dep. 99:6 to 100:11, Dec. 2, 2013; Ex. H, Gustenhoven Cert. ¶¶ 3, 6, 11. Ex. I, Kasarda Cert. ¶¶ 9-10; Ex. K, Smith Cert. ¶ 7; Ex. L, Waldrop



Cert. ¶¶ 3, 5; Ex. M Weber Cert.<sup>5</sup> ¶ 3. The LSBPA notes were offered for sale through a Private Placement Memoranda (“PPM”), which was provided to investors. Ex. 37 to Asmar Cert.; Ex. 12, M. Kwasnik Dep. 123:11-12, Oct. 29, 2013; Ex. 19, W. Kwasnik Dep. 108:4-8, Dec. 2, 2013. According to the PPM, the LSBPA Notes were “primarily secured by 100% of the beneficial interest of all Irrevocable Life Insurance Trusts purchased by Liberty State Benefits of Pennsylvania, Inc.” The PPM also stated that the LSBPA Notes were secondarily secured by assets of LSFHC, which owned LSBPA. Ex. 37 to Asmar Cert. The PPM also referred to the LSBPA Notes as an “investment” and “securities.” Ibid. However, the LSBPA Notes were not secured. Ex. G, Bassman<sup>6</sup> Cert. ¶¶ 7-9.

M. Kwasnik, McCorry, and Schifano told investors that their money would be used to purchase life insurance policies and beneficial interests in Irrevocable Life Insurance Trusts. However, investor funds were commingled with other funds in accounts belonging to LSFHC and another one of its subsidiaries, Liberty State Benefits of Delaware. Ex. 13, M. Kwasnik Dep. 215:2-8, Oct. 30, 2013; Ex. E, Reyes<sup>7</sup> Cert. ¶ 9. These funds were then paid to Kwasnik, Rodio, Kanowitz, & Buckley, P.C. and to the Respondent and members of his family. Reyes Cert. ¶¶ 9, 25, 29, 32. Funds from new investors were also used to pay existing investors. Reyes Cert. ¶¶ 9, 21, 23, 28. This is tantamount to a Ponzi scheme and led investors to believe that the LSBPA Notes were valid.

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<sup>5</sup> William Gustenhoven, Michelina Kasarda, Maryann Smith, Joseph Waldrop, and George Weber invested in the Liberty Notes.

<sup>6</sup> Rudolph Bassman is Chief of Enforcement with the Bureau. His certification was prepared as part of the Bureau’s action against Respondent.

<sup>7</sup> Isaac Reyes is an investigator with the Bureau. His certification was prepared as part of the Bureau’s action against the Respondent.

Investors were also misled about the registration status of the LSBPA Notes. The LSBPA Notes were neither registered with the Bureau, nor exempt from registration. Bassman Cert. ¶¶ 7-9. Further, M. Kwasnik, McCorry, and Schifano were not registered to sell the LSBPA Notes, and acted as unregistered agents in doing so. Id. at ¶¶ 4-6. Respondent was aware that commissions were paid to Schifano and McCorry for their work in selling the LSBPA Notes. Ex. 21, W. Kwasnik Dep. 96:24 to 97:3, April 21, 2011. Respondent provided the Private Placement Memoranda to Schifano. Id. at 145:24 to 147:19.

In its investigation, the Bureau identified 73 people who invested in the LSBPA Notes. Reyes Cert. ¶ 6. Together, they invested approximately \$10,854,780.80 in the LSBPA Notes. Id. at ¶ 9. At least 61 investors lost money in the aggregate amount of \$8,607,604.48. Id. at ¶ 36.

Respondent, as CEO and President of LSBPA and LSFHC, participated in a fraudulent scheme along with his son, McCorry, and Schifano. Respondent admitted in a deposition that he understood that as President of LSBPA, he acted as a fiduciary to the holders of the LSBPA Notes and owed a duty to act in the investors' best interest. Ex. 21, W. Kwasnik Dep. 89:8 to 91:11, April 21, 2011. However, investors, primarily the elderly who had saved for their retirement and had previous relationships with M. Kwasnik, McCorry, or Schifano, were presented with false and misleading information so they would invest in the LSBPA Notes. Ex. H, Gustenhoven Cert. ¶ 4; Ex. K, Smith Cert. ¶ 4-5; Ex. L, Waldrop Cert. ¶ 3-4; Ex. M, Weber Cert. ¶ 4. The investors' money was then used to enrich Respondent, M. Kwasnik, McCorry, and Schifano.

Based upon the above undisputed facts, I concur with the ALJ that the Department proved the allegations in Count One of the OTSC, and I FIND that the Respondent took part in a fraudulent scheme to deceive investors. Schifano, McCorry, and M. Kwasnik misled clients to invest in the LSBPA Notes. Respondent was aware that Schifano and McCorry were paid commissions to sell

the LSBPA Notes. The investors' money was then used, in part, to enrich Respondent and his family. These actions violate N.J.S.A. 17:22A-40a(2) (violating any insurance law or regulation), (7) (committing any insurance unfair trade practice or fraud), (8) (demonstrating untrustworthiness), and (16) (committing any fraudulent act) as alleged in the OTSC.

Count Two—The Respondent failed to disclose to the Commissioner that he entered into a Consent Order with the Bureau.

Count Two of the OTSC alleges that Kwasnik did not report to the Commissioner that on September 4, 2015, he entered into a Consent Order with the Chief of the New Jersey Bureau of Securities, another governmental agency in this State, within 30 days of the final disposition of the matter in violation of N.J.S.A. 17:22A-47a.

Pursuant to N.J.S.A. 17:22A-47a, a producer must report to the Commissioner any administrative action taken against him or her by another governmental agency in this State within 30 days of the final disposition of the matter. The report must include a copy of the order, consent order, or other relevant legal documents. The Department submitted uncontroverted evidence that on September 4, 2015, Kwasnik entered into a Consent Order with another governmental agency and failed to report it to the Commissioner.

In March 2011, the Bureau filed a Verified Complaint against LSFHC and LSBPA under Docket Number ESX-C-59-11. Asmar Cert., Ex. 1. In October 2011, the Bureau filed an Amended Verified Complaint which named Respondent, M. Kwasnik, McCorry, and Schifano as defendants. Asmar Cert., Ex. 3.

On September 4, 2015, the Respondent entered into the Consent Order with the Bureau. The Respondent agreed to pay \$23,000 in civil penalties for violating N.J.S.A. 49:3-52e of the New Jersey Uniform Securities Law ("Securities Law") and to cooperate with the Bureau in the

ongoing litigation. He was also restrained from certain activities, such as issuing or selling securities. Ex. B.; Ritardi Cert. ¶ 6.

The Respondent did not report to the Commissioner that he entered into the Consent Order within 30 days as required by N.J.S.A. 17:22A-47a. Rather, the Department learned of the Consent Order on November 5, 2015 when Department Investigator Thomas Ritardi reviewed a News Release from the Bureau dated October 22, 2015. Ritardi Cert. ¶ 8. The News Release concerned a Judgment entered against the other defendants, and indicated that the Respondent had previously settled in the matter with the Bureau. Ritardi Cert. ¶ 9.

Based upon the above undisputed facts, I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC, and I FIND that the Respondent's actions in not reporting the Consent Order to the Commissioner within 30 days violated N.J.S.A. 17:22A-47a as alleged in the OTSC.

Count Three—The Respondent failed to disclose that he was involved in an administrative proceeding with the Bureau when he applied to renew his insurance producer license on January 9, 2015.

Count Three of the OTSC alleges that on his January 9, 2015 renewal application, Kwasnik failed to disclose that he was involved in an administrative proceeding with the New Jersey Bureau of Securities brought in 2011 under Docket Number ESX-C-59-11, in violation of N.J.S.A. 17:22A-40a(1) and (15).

The Department submitted undisputed evidence to show that Respondent completed an application to renew his New Jersey insurance producer license and submitted it to the Department on or about January 9, 2015.<sup>8</sup> On the application, Respondent answered “no” to the fourth question

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<sup>8</sup> According to the Department's Motion for Summary Decision, Respondent also failed to disclose to the Department that he was involved in an administrative proceeding with the Bureau when he

which read, “[h]ave you been named or involved as a party in an administrative proceeding, including a FINRA sanction or arbitration proceeding regarding any professional or occupational license or registration, which has not been previously reported to this insurance department?” Ritardi Cert. ¶¶ 4-5, Ex. A. This response was incorrect and misleading because Respondent was named as a defendant in the action referenced above instituted by the Bureau beginning in 2011 and ending when the Respondent entered into a Consent Order in September 2015.

Accordingly, I concur with the ALJ that the Department proved the allegations in Count Three of the OTSC, and I FIND that the Respondent’s actions in not disclosing that he entered into a Consent Order on his renewal application violated N.J.S.A. 17:22A-40a(1) (providing incorrect, misleading, incomplete or materially untrue information in the license application) and (15) (intentionally withholding material information or making a material misstatement in an application for a license) as alleged in the OTSC.

### PENALTY AGAINST THE RESPONDENT

#### Revocation of Respondent’s Producer License

With respect to the appropriate action to take against the Respondent’s insurance producer license, I find that the record sufficiently supports license revocation and compels the revocation of the Respondent’s producer license. Accordingly, I concur with the ALJ’s recommendation that the Respondent’s producer license be revoked.

A licensee’s honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer “calls for precision, accuracy and forthrightness.” Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). Additionally, a licensed producer is better

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applied to renew his insurance producer license on February 1, 2013. However, this was not alleged in the OTSC.

placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (1980). A producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the insurance industry and on the public.

This State has a strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98 N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected with a public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Because of the strong public interest in regulating insurance producers, as noted by the ALJ, revocation has consistently been imposed against the licenses of New Jersey insurance producers that engage in fraudulent acts. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Only the rarest of mitigating factors will preclude license revocation for those who directly commit fraud. Commissioner v. Goncalves, OAL Dkt. No. BKI 31188-03, Initial Decision (12/03/03), Final Decision and Order (05/24/04), OAL Dkt. No. BKI 3301-05, On Remand, Initial Decision (11/17/05), Final Decision and Order (02/15/06).

Here, as set forth above, Kwasnik and others with whom he was associated, engaged in fraudulent activity to benefit themselves. The victims of this fraud were often senior citizens who were left with their life savings and investments depleted. Significantly, many of those who were victimized had previous relationships with M. Kwasnik, Schifano, or McCorry and trusted their advice on important financial matters. Accordingly, based upon my review of the record and the Initial Decision, I am compelled to agree with the ALJ's determination that the revocation of Kwasnik's insurance producer license is necessary and appropriate.

### Monetary Penalty Against Respondents

As discussed by the ALJ, under Kimmelman, certain factors are to be examined when assessing administrative monetary penalties, such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers. Violations may be up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

The first Kimmelman factor addresses the good faith or bad faith of the violator. I agree with the ALJ that the Respondent’s conduct demonstrates bad faith and weighs in favor of a monetary penalty. The Respondent was a knowing participant in a fraudulent scheme that targeted 73 investors. As a result, he was named in and settled an administration action by the Bureau initiated in 2011. The Respondent entered into a Consent Order to settle the administrative action on September 4, 2015. On January 9, 2015, he failed to disclose his involvement in the administrative proceeding with the Bureau on his renewal application. He then failed to disclose that he entered into the Consent Order within 30 days as required by N.J.S.A. 17:22A-47a. The Respondent’s purposeful concealment of this information demonstrates that he was not acting in good faith.

As to the second Kimmelman factor, I agree with the ALJ that no proofs have been provided regarding the Respondent’s ability to pay the fines imposed. Accordingly, this factor is neutral with regard to analysis of the penalty to be imposed.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from

illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. I agree with the ALJ that no evidence was presented regarding the profit the Respondent made from the illegal activity, though I note that the Respondent remained licensed while withholding information of his wrongdoing from the Commissioner. Further, evidence in the record indicates that 73 people invested over \$10.8 million in the LSBPA Notes and at least 61 investors lost money totaling over \$8.6 million. Reyes Cert. ¶¶ 6, 9, 36. However, the Respondent's portion of profit from that sum is undetermined.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. I agree with the ALJ that the public was undoubtedly harmed by the breach of fiduciary duty to those who were affected by the fraudulent acts of the Respondent. Significantly, many of those who were victimized by the fraudulent scheme were senior citizens who had previous relationships with M. Kwasnik, Schifano, or McCorry and trusted them with important financial matters. They exploited this trust for their financial benefit. The public is significantly harmed when licensed professionals who hold fiduciary positions engage in fraudulent schemes like the Respondent. This undermines the public's confidence in insurance producers, and places at risk those consumers who have dealings with the Respondent. This factor then weighs in favor of the imposition of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The ALJ noted that the Respondent withheld crucial information from the Commissioner for years, from the date of the lawsuit brought by the Bureau in 2011, until the filing of the present administrative order years later. Further, the Respondent participated in a scheme to defraud investors from



December 2008 to March 2010. This factor then weighs in favor of the imposition of a monetary penalty.

The sixth factor is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Under the Consent Order, Kwasnik agreed to pay \$23,000 in civil penalties for violating N.J.S.A. 49:3-52(e) of the Securities Law. Although he was indicted in New Jersey District Court, *United States v. Kwasnik*, Criminal No. 17-52-NLH, no criminal penalties have yet been rendered. The indictment alleges that Respondent and M. Kwasnik defrauded clients of M. Kwasnik's law firm by deceiving them into setting up trusts, naming M. Kwasnik as a trustee, and placing their money into accounts to which M. Kwasnik had access. The money was then moved from these accounts into other accounts, including accounts of LSBPA, and used by the Respondent and M. Kwasnik for their legal and personal expenses. Ex. B. to Posta's letter to ALJ Sanders dated May 8, 2017. Although the actions in the indictment are similar to those in the OTSC, they are not same. Different investors were targeted and money was obtained in another way. Accordingly, although Kwasnik agreed to pay \$23,000 in civil fines to the Bureau, he has not faced any criminal actions for his part in the fraud detailed in the OTSC and the Department's motion for Summary Decision.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. Here, Respondent has not been found to have previously violated the Producer Act.

Weighing the Kimmelman factors and based upon the violations I ADOPT the recommendations of the ALJ that Kwasnik shall pay civil monetary penalties. However, the ALJ was not bound by the order in which the allegations were pled with regard to the imposition of monetary penalties. Here, we have three counts. Count One concerned the Respondent's acts, practice, or course of business that operated a fraud or deceit upon 73 investors through the Ponzi scheme described above. Of the three violations, this is the most egregious and accordingly warrants the most significant penalty. I note that multiple acts by the Respondent were needed to perpetuate the fraud upon those 73 investors and that the defrauding of each of the 73 investors each constitute separate violations of the Producer Act and the standards of conduct under our insurance laws. Therefore, I hold that it is necessary and appropriate to increase the fine for Count 1 to a total of \$20,000. Similarly, Counts Two and Three concern failures to disclose the Bureau's action to the Department, and although these are significant failures, they pale in comparison to the actual actions of the Respondent in perpetrating the fraudulent scheme upon the 73 investors. Accordingly, I modify the fines for Count Two and Three to \$2,500 each. This reallocation of the penalties results in a total monetary penalty for all Counts of \$25,000 as recommended by the ALJ. For the foregoing reasons, I find that these penalties are reasonable and justified.

#### CONCLUSION

Having carefully reviewed the Initial Decision and the entire record herein, I hereby ADOPT the Findings and Conclusions of the ALJ as set forth in Initial Decision. Specifically, I ADOPT the ALJ's conclusions and hold that the Respondent has violated the Producer Act as charged in the OTSC. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on all Counts as charged in the OTSC. I ADOPT the conclusion in the Initial Decision that revocation of the Respondent's insurance producer license is the appropriate and necessary sanction. I further ADOPT the ALJ's recommendations as to the

total amount of the monetary penalties for all Counts of the OTSC and FIND that the following fines be imposed and allocated as follows: \$20,000 for Count One, \$2,500 for Count Two, and \$2,500 for Count Three for a total of \$25,000.

It is so ORDERED on this 1<sup>ST</sup> day of May, 2018.

  
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Marlene Caride  
Acting Commissioner

JD Kwasnik FO/Orders